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In the Supreme Court of the United States

OCTOBER TERM, 1989

GOLDHOFER FAHRZEUGWERK GMBH & CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the notice regarding the duty that petitioner was required to pay on its imported goods was constitutionally adequate.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 885 F.2d 858. The decision of the United States Court of International Trade (Pet. App. A14-A23) is reported at 706 F. Supp. 892.

JURISDICTION

The judgment of the court of appeals (Pet. App. A11) was entered on September 19, 1989. A petition for rehearing was denied on October 20, 1989. Pet. App. A12. The petition for a writ of certiorari was filed on January 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Customs Service determines and collects duties on goods imported into this country. A customs officer estimates the value of incoming merchandise by using all reasonable means. See 19 U.S.C. 1500(a); 19 C.F.R. 151.1-151.14. He must then ascertain the rate of duty applicable to such merchandise. 19 U.S.C. 1500(b). After fixing the amount of duty to be paid, the customs officer "liquidates" the entry of the merchandise. 19 U.S.C. 1500(c) and (d).[1] He must give notice of the liquidation to the importer, its consignee, or agent in accordance with the regulations prescribed by the Secretary of the Treasury. 19 U.S.C. 1500(e).

The Secretary's regulations require that notice of liquidation be made on a "bulletin notice of liquidation" – Customs Form 4333 or 4335. 19 C.F.R. 159.9(a). That bulletin is to be posted for the information of importers in a conspicuous place in the customhouse at the port of entry. 19 C.F.R. 159.9(b). The entries covered by the bulletin notice are stamped "Liquidated," which is deemed to be the legal evidence of liquidation. 19 C.F.R. 159.9(c). The regulations also provide that the Customs Service will endeavor to provide importers or their agents with Customs Form 4333-A, which is called a "Courtesy Notice." That notice "shall serve as an informal, courtesy notice and not as a direct, formal and decisive notice of liquidation." 19 C.F.R. 159.9(d).

The liquidation decision of the Customs Service is final unless a protest is filed with the appropriate Customs officer within 90 days after the notice of liquidation. 19 U.S.C.

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[1] "Liquidation" is defined as "the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. 159.1. With certain exceptions not here applicable, all imported goods must be liquidated. 19 C.F.R. 159.2.

1514(c)(2).[2] If the protest is denied, the party may contest the denial by bringing a civil action in the Court of International Trade. 28 U.S.C. 1581(a).

2. Petitioner is a corporation organized under the laws of the Federal Republic of Germany. Pet. App. A3. Petitioner imported a multi-axle "gooseneck" semitrailer, Entry No. 101757, on February 16, 1980, at the Port of Norfolk, Virginia. *Ibid.* An error by the Customs Service caused the name of an unrelated third party, Walsen Design and Manufacturing, to be included on the computer printout sheet that was to be posted in the customhouse on June 5, 1981. *Ibid.* Before posting the "bulletin notice of liquidation," however, a clerk manually corrected the error by writing in petitioner's name and address. *Ibid.* The courtesy notice and the bill, however, were sent to the party originally listed on the printout. As a result, petitioner never received a courtesy notice of the liquidation or an original bill. *Ibid.*

The Customs Service prepared a "REBILL" on September 4, 1981 – the 91st day after the June 5, 1981, liquidation – and addressed it to petitioner in West Germany. Pet. App. A4. Petitioner filed a protest on December 1, 1981. *Ibid.* The Customs Service received the protest 179 days after the bulletin notice of liquidation. Accordingly, the Customs Service denied the protest as untimely because it was not filed within the 90-day protest period set forth in 19 U.S.C. 1514(c)(2). *Ibid.*

3. Petitioner then filed this suit in the United States Court of International Trade. Petitioner argued that it had not received proper "bulletin" notice as required by 19 U.S.C. 1500(e). It also claimed that the Customs Service's

[2] Protests may be brought by: (1) the importers or consignees shown on the entry papers, or their sureties, (2) any person paying any charge or exaction, (3) any person seeking entry or delivery, (4) any person filing a claim for drawback, or (5) any authorized agent of any of the above-described persons. 19 U.S.C. 1514(c).

failure to send a courtesy notice was a violation of the Due Process Clause. Pet. App. A4.

The trial court granted the government's motion for summary judgment. The court recognized that notice is inadequate if "the importer could * * * have reasonably been misled or confused by the bulletin notice of liquidation, as posted." Pet. App. A17. But the court stated that it could not "envision how [petitioner] could have been misled by this notice." *Ibid.* The court noted that: (1) petitioner's name was legible and easily seen, (2) petitioner's name was clearly intended to replace the crossed-out name, and (3) petitioner's name appeared in its proper alphabetical sequence, next to the correct entry number as well as the correct date of entry. The trial court held: "A prudent importer would have concluded that it was his entry which was posted. At the least, [petitioner] should have inquired into the nature of the correction." *Ibid.*

The trial court also ruled that the Customs Service was not constitutionally required to send a courtesy notice by mail. It noted that "[t]he only notice that is statutorily mandated is bulletin notice 'in a conspicuous place in the customhouse at the port of entry.' " Pet. App. A19. It further held that "[t]he agency has no duty 'to enlarge or broaden the mandatory requirement of the law' * * * merely because the importer has become accustomed to an extended courtesy." *Ibid.* The trial court rejected petitioner's contention that this Court's decision in *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791 (1983), means that posted notice is always constitutionally inadequate where the name of the interested party is known. Relying on *Tulsa Professional Collection Servs., Inc.* v. *Pope*, 485 U.S. 478 (1988), the trial court held that "the proper focus in determining the sufficiency of notice is on reasonableness; 'whether a particular method of notice is reasonable depends on the par-

ticular circumstances.' " Pet. App. A21. The trial court concluded that

> [c]learly, the bulletin notice is a means which is reasonably calculated to apprise an importer of the liquidation. One who avails himself of the advantages of importing goods into this country can expect liquidation notice to be posted in a specified location, with little probability of it being removed. A reasonably prudent importer is amply apprised of any action taken with respect to his merchandise through the bulletin process and must merely monitor the bulletin to be aware of liquidation.

Id. at A22.

4. The court of appeals affirmed. The court agreed with the trial court that the Customs Service's "posting 'bulletin notice' of liquidation alone both complies with the applicable customs laws and regulations and satisfies the minimum constitutional standards for due process." Pet. App. A2. The court of appeals observed that this Court's decision in *Mennonite Bd. of Missions* means that the Customs Service must provide notice that is as likely as notice by mail "to ensure actual notice." *Id.* at A7. The court then considered several factors to determine whether the notice in this case met that standard—*i.e.*, (1) whether the notice relied on chance alone to reach the interested party, (2) whether the notice was designed to attract the attention of the interested party, (3) whether the means of providing notice was reliable, and (4) whether there were any "feasible and customary" alternatives to the form of notice chosen. *Id.* at A7-A9.

The court of appeals concluded that the Custom Service's "posting of bulletin notice of liquidation in the customhouse at the port of entry alone was as certain to ensure actual notice of liquidation to the importer of record or its local

Customs broker as mail notice." Pet. App. A9-A10. The court reasoned that "[petitioner], by choosing to enter its goods at a particular port of entry, knew that liquidation would occur there and selected that precise location to receive the notice of that liquidation." *Id.* at A7. Moreover, the court of appeals found that the notice was designed to attract the attention of the interested party because it listed "the name of the importer of record, the date of entry, the liquidation date, the region/district/port number, the action, and the type of entry and number." *Id.* at A8. In addition, the court observed that there was no evidence that bulletin notice was unreliable. *Id.* at A9.

ARGUMENT

Petitioner maintains (Pet. 7-9) that notice by mail is constitutionally required in all cases where the intended recipient's name and address are ascertainable.[3] Petitioner is mistaken; this Court's decisions do not impose such an inflexible requirement.

It is well settled that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315. Under *Mullane*, the determination whether a particular type of notice is constitutionally adequate requires

[3] In its section entitled "Questions Presented for Review" (Pet. i), petitioner also sets forth an equal protection issue. Petitioner, however, does not discuss that question in the text.

balancing the interest of the government in finality and the individual's interest in actual notice. *Id.* at 314.

Petitioner erroneously contends (Pet. 8) that the Court in *Mennonite Bd. of Missions* rejected the *Mullane* approach and adopted a per se rule requiring notice by mail in all cases. In fact, the Court in *Mennonite Bd. of Missions* stated that the "case [was] controlled by the analysis in *Mullane*." 462 U.S. at 798. And although the Court in *Mennonite Bd. of Missions* required notice by mail in that case, it did not create a per se rule that such notice is constitutionally required in all cases. On the contrary, the Court approved "[n]otice by mail *or other means* as certain to ensure actual notice." 462 U.S. at 800 (emphasis added). Thus, the Due Process Clause continues to mean that the courts must look to the circumstance of a particular case to determine the adequacy of notice. See, *e.g.*, *Tulsa Professional Collection Servs.* v. *Pope*, 485 U.S. 478 (1988).

In this case, the court of appeals followed the Court's command in *Mennonite Bd. of Missions* that the notice given petitioner be as reliable as notice by mail. See Pet. App. 7, 9-10. And petitioner does not challenge the court of appeals' critical conclusion that the notice in this case was as likely as notice by mail to result in actual notice.[4] Thus, no further review is warranted.[5]

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[4] The court of appeals reasonably found that petitioner's own lack of care resulted in the absence of actual notice in this case. Petitioner knew where the notice would be posted; it simply chose not to monitor the liquidation notices even though "[t]he need to monitor the bulletin posting has been repeatedly emphasized." Pet. App. A19.

[5] The appellate court cases that petitioner cites (Pet. 9) did not involve situations where the notice given was as likely as mail notice to result in actual notice. Thus, they do not conflict with the holding in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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